***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

75-7021

To be argued by
DAN BRECHER

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In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

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P/S

ROBERT J. FINE,

Plaintiff-Appellant,

vs.

THE CITY OF NEW YORK, FRANK KLEIN, MARVYN KORNBERG, ESQ., ALBERT GAUDELLI, ESQ. and HERBERT KAHN, ESQ.,

Defendant-Appellees,

and

PTL. ANTHONY SALADINO, ESTATE OF ROBERT L. RADTKE, DET. MICHAEL SASSAMAN, PTL. "JOHN" STANLEY, PTL. "JOHN" DWYER, PTL. "JOHN" FISCHER, SGT. "JOHN" MURRAY, DAVID FAULKNER and MRS. DOLORES FAULKNER,

Defendants.



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BRIEF OF PLAINTIFF-APPELLANT
ROBERT J. FINE

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2. Was the District Court correct in finding that the complaint states no claim against the defendants Assistant District Attorney Albert Gaudelli and former Assistant District Attorney Herbert Kahn?
3. Was the District Court correct in finding that the complaint states no claim against the defendant Marvyn Kornberg unless it is amended to include additional factual allegations?
4. Was the District Court correct in finding that the complaint states no claim against the defendant Frank Klein?
5. Was the District Court correct in refusing to exercise ancillary jurisdiction over those of plaintiff's claims against the defendants which sound in causes of action other than provided for in the federal statutes, but which arise out of the same facts which gave rise to the pending federal claims against some of the defendants?

## STATEMENT OF THE CASE

### NATURE OF THE CASE

Plaintiff-Appellant Robert J. Fine ("Fine") appeals from Orders from the Honorable Charles L. Brieant, Jr., United States District Judge dismissing the complaint herein against the defendants City of New York, Albert Gaudelli, Herbert Kahn, Marvyn Kornberg and Frank Klein.

### COURSE OF PROCEEDINGS

This action was instituted on July 22, 1974 by plaintiff Fine. All defendants have been served with process and have answered herein except the defendants Estate of Robert L. Radtke, David Faulkner and Mrs. Dolores Faulkner who have defaulted herein. On November 7, 1974, the motions of the defendants Marvyn Kornberg ("Kornberg"), Frank Klein ("Klein"), Albert Gaudelli ("Gaudelli") and Herbert Kahn ("Kahn") to dismiss the complaint were submitted to the District Court. Kornberg and Klein based their motions on the allegation that the complaint fails to state a cause of action against them. The defendants Gaudelli and Kahn based their motion on the allegation that Assistant District Attorneys have absolute immunity from civil suit for damages arising from their actions in instituting and prosecuting criminal proceedings. The City

of New York did not move to dismiss the complaint, nor did any other defendant so move.

Plaintiff opposed the motions of Kornberg and Klein arguing that actionable claims against them were stated in the complaint which alleged the Fourteenth Amendment and 28 U.S.C. §1331 as bases for jurisdiction, together with allegations that the amount in controversy exceeds $10,000.00.

Plaintiff opposed the motion of Gaudelli and Kahn on the same basis, and further maintained that the complaint alleged actions of the defendants Gaudelli and Kahn which were not within their official responsibilities. The defendants Gaudelli and Kahn submitted no supporting affidavits denying the complaint's allegations of criminal acts by them.

There was no evidentiary hearing held herein. Interrogatories and depositions of the defendants Ptl. Anthony Saladino and Det. Michael Sassaman were had shortly after the submission of the defendants' motions to dismiss.

On November 22, 1974, Judge Brieant granted the motions to dismiss of the defendants Gaudelli and Kahn, Klein and Kornberg, and on the Court's own motion, dismissed as to the City of New York, finding that the complaint failed to state a claim against these defendants under any federal statute and refused to assert ancillary jurisdiction over these defendants. Plaintiff filed a Notice of Appeal of this decision.

As soon as plaintiff received signed copies of the defendants Saladino's and Sassaman's depositions, plaintiff submitted them to the Court with a letter dated January 30, 1975 requesting reconsideration of the Court's decision based on this new evidence. Plaintiff did so upon the advice of Judge Brieant's law secretary, Ms. Joan Dolan. However, Ms. Dolan has advised me that, because of the overburdened case-load and undermanned situation with which the Court is confronted, she was unable to inform Judge Brieant that she had advised this procedure and he, on February 7, 1975, rendered a decision which treated the letter as an untimely motion to reargue his November 22, 1974 decision. Plaintiff filed an Amended Notice of Appeal. Plaintiff conferred with Ms. Dolan again and submitted a formal Rule 60(b) motion for reargument which was heard on May 27, 1975.

On that day, Judge Brieant rendered a decision which granted reargument, but adhered to his earlier decision in all respects except that plaintiff was granted leave to serve an Amended Complaint against defendant Kornberg. Plaintiff filed a Second Amended Notice of Appeal.

In May, 1975, Judge Brieant granted the motion of the Corporation Counsel of the City of New York to withdraw as counsel to the defendant police officers. It now

appears that the Corporation Counsel will again be representing the defendant police officers.

## STATEMENT OF THE FACTS

David Faulkner, age 16, was trying to sell a gun in a bar in Queens on March 5, 1972. Police overheard him, questioned him, and he attempted to avoid arrest by telling the police that the gun belonged to Robert Fine, age 39, the plaintiff-appellant herein, an acquaintance of Faulkner. Mr. Fine had never been arrested and had no police record whatsoever. He was the owner of his own taxicab, possessed a hack license and drove his own cab.

That evening, four police officers and the defendant David Faulkner broke into and ransacked plaintiff's apartment (Dep. of Sassaman; page 98a - line 15 and page 97a - line 13).* Again on March 6, 1972, Det. Sassaman, Det. Radtke and the defendants Faulkner and Kornberg broke into plaintiff's apartment (page 83a - line 20 and page 115a - line 21 through page 116a - line 8).

The March 6, 1972 entry into plaintiff's locked apartment was gained by the defendant Faulkner's climbing a rear fire escape, breaking a window, climbing into the apartment

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*Refers to the pages of the Appendix filed by the Plaintiff-Appellant.

through the window and letting the police and Mr. Kornberg in through the front door, after restraining the plaintiff's two dogs (page 81a - line 13 through page 82a - line 17 and page 96a- lines 9-15). Before breaking into the apartment, the two police officers, Faulkner and Kornberg went to the superintendent of the building to gain entry to the plaintiff's apartment (page 76a - line 24). The police had no search warrant, no arrest warrant and, according to the New York State Supreme Court decision of Justice Brennan, were without any probable cause to justify breaking into the plaintiff's apartment on March 5 or 6, 1972 (page 84a - lines 4-16).

After searching plaintiff's apartment for five minutes and determining that the plaintiff was not there, the two police officers, Faulkner and Kornberg remained in plaintiff's apartment for one or two hours (page 86a - lines 8-14).

On March 6, 1972, the police removed from plaintiff's apartment everything that was visible and appeared to have value (page 92a - line 11). They also removed everything that was of value which they found after searching the plaintiff's dresser drawers and every closet in the apartment (page 92a - line 17 through page 93a - line 11). This included the following items which were never returned to plaintiff: $3,800.00 in cash; an extensive and valuable coin collection; 20,000

Colombian pesos (worth about $1,000.00); a phonograph; expensive jewelry; safety deposit box keys and other items. They also destroyed plaintiff's furniture, impounded plaintiff's two pedigreed dogs (which were eventually destroyed, and ripped apart his clothing as if they were on a rampage.

Det. Radtke told Det. Sassaman to keep a box of American coins taken from plaintiff's apartment on March 6, 1972 and not voucher them to the Police Department Property Clerk (page 103a - line 25; also generally discussed at page 101a - line 25 through page 104a - line 2). Det. Radtke admitted to Det. Sassaman that he was involved in an attempt to extort money from the plaintiff (page 108a - lines 17-22 and page 111a - line 19 through page 112a - line 18).

On March 7, 1972, Sassaman again entered plaintiff's apartment without a warrant (page 100a - line 8 and page 101a - line 19).

The Queens County District Attorney's Office advised Det. Sassaman that he could be arrested for burglary and bribery with regard to the March 5, 6 and 7, 1972 entries into the plaintiff's apartment (page 110a - line 14).

Special Assistant Attorney General Carl Soller of the staff of Special State Prosecutor Maurice Nadjari was investigating Det. Radtke's breaking into Mr. Fine's apartment.

theft of Mr. Fine's property and coercion of bribes from Mr. Fine (page 110a - line 29). Apparently fearful of the results of the Special State Prosecutor's investigation of this matter, Det. Radtke committed suicide (page 113a - line 19).

In March, 1973, Sassaman testified before a Special Prosecutor's Grand Jury regarding the breaking and entering of Mr. Fine's home (page 114a - line 25 through page 115a - line 9). Apparently, the defendant Kornberg also testified before that Grand Jury, but only after first requesting and receiving immunity from prosecution regarding the breaking and entering of plaintiff's apartment and his alleged participation in a conspiracy involving the defendant Mrs. Faulkner to obtain a $10,000.00 bribe from Mr. Fine.

Kornberg went with the police to the superintendent of plaintiff's building when they tried to gain access to plaintiff's apartment. It is alleged that when the police officers asked the superintendent to permit them to enter plaintiff's apartment, Mr. Kornberg was with them and did not, at that time, identify himself as an attorney. Thus, the superintendent has stated that he was under the impression that Kornberg was a policeman because Det. Radtke stated "We are the police."

Plaintiff was subsequently arrested on March 7, 1975 while driving his licensed taxicab which he also owned. After his arrest on charges including possession of a pistol, coercion, sodomy and endangering a minor, plaintiff was beaten and threatened with a gun by the police, who also sought to extort $10,000.00 from him to have the charges against him dropped. However, the major charges, including sodomy, were subsequently dropped prior to a suppression hearing. After the suppression hearing, all charges against plaintiff were dismissed. The dismissal of all of the charges against plaintiff was not appealed, and plaintiff has no charges pending against him.

However, despite judicial orders requiring the return of property taken from plaintiff's house in the break-ins and from plaintiff's person when he was arrested, the defendant City of New York has still failed and refused to return to plaintiff his hack license, his driver's license, and the other items of personal property listed above. His mug shots and fingerprints were ordered returned to him, but these too have not all been returned by the City. The New York City Property Clerk has failed to return plaintiff's phonograph, vault keys and certain other items.

The defendant Assistant District Attorney Gaudelli was directed by New York State Supreme Court Justice Livotti to hold for safeguarding certain property allegedly belonging to the plaintiff. Gaudelli, apparently engaging in a vendetta against the plaintiff, allegedly violated Justice Livotti's Order and turned over some of this property to police against whom the New York City Police Department had brought charges based on plaintiff's complaint.

The defendant Klein was recommended to plaintiff to be his attorney by a guard at the House of Detention. Mr. Klein told plaintiff that Kornberg had brought him an offer from Mrs. Faulkner to have her son David drop the charges against plaintiff for a payment of $10,000.00. Moreover, Klein allegedly participated in the extortion of $500.00 which plaintiff paid to Det. Radtke to have plaintiff's cab released from impoundment.

## ARGUMENT

### POINT I

### THE COMPLAINT STATES A CAUSE OF ACTION AGAINST THE CITY OF NEW YORK FOR WHICH THE UNITED STATES CONSTITUTION AUTHORIZES THAT RELIEF MAY BE GRANTED

The Court, on its own motion, held that the complaint stated no claim against the City of New York "under the federal statute." Subsequently adhering to this decision in deciding the motion to reargue, the Court stated that the decision in Brault v. Town of Milton, _____ F.2d _____ (2d Cir. Decided February 24, 1975) was not in point because the town as a municipal corporation acted directly in the Brault case. Appellant respectfully submits that a town can never act directly, but may only act through individuals who serve as employees or agents thereof.

It is further respectfully submitted that the Brault case is directly in point, and that the District Court erred in its stated reasoning that "the instant case is no more than an attempt to visit liability upon the defendant municipality for the alleged activities of police officers on a rampage, acting tortiously and beyond their actual authority."

The facts show that the City has not only acted through its rampaging police officers, but also through the New York City Property Clerk who is withholding valuable property belonging to plaintiff which the police wrongfully took from plaintiff. Plaintiff's hack license, too, is being wrongfully withheld.

In the Brault case, the Court of Appeals held that "the 14th Amendment itself gives rise to a claim for relief based upon its violation, and that the district court has federal question jurisdiction, 28 U.S.C. §1331(a), over any such claims where the amount in controversy exceeds $10,000." (See Brault v. Town of Milton at pages 1868-1869).

Paragraph 1 of the complaint herein refers to both the 14th Amendment and 28 U.S.C. §1331 as bases for jurisdiction. Paragraphs 2 and 29 of the complaint herein allege that the amount in controversy exceeds $10,000.00. The 14th Amendment is also referred to in paragraphs 6, 16, 21, 24, 25 and 32 of the complaint.

In the Brault decision, the Court of Appeals clearly rejected "the view, therefore, that municipalities enjoy any special status which would immunize them from suits to redress deprivations of federal constitional rights." (See Brault v. Town of Milton at page 1875.)

The District Court's November 22, 1974 decision and the May 27, 1975 decision adhering to the former are clearly in conflict with the Brault decision which was decided on February 24, 1975.

The District Court's decision also contravenes the decision of the New York State Court of Claims in James R. Herman, et al., Claimants v. State of New York, 78 Misc.2d. 1025 (June 25, 1974). That case visited liability upon the State of New York for the action of the State Police in negligently obtaining and executing a "no-knock" search warrant. The decision in that case cited the decision of "Judge Fuld in the case of Bing v. Thunig (2 N.Y.2d 656, 666) wherein he stated:

> 'The doctrine of respondent superior is grounded on firm principles of law and justice. Liability is the rule, immunity the exception. It is not too much to expect that those who serve and minister to members of the public should do so, as do all others, subject to that principle and within the obligation not to injure through carelessness. * * * Insistence upon respondent superior and damages for negligent injury serves a two-fold purpose, for it both assures payment of an obligation to the person injured and gives warning that justice and the law demand the exercise of care.'" Herman v. State of New York, ibid. at page 1031.

## POINT II

### PLAINTIFF HAS STATED CAUSES OF ACTION AGAINST THE DEFENDANTS KORNBERG, GAUDELLI, KAHN AND KLEIN FOR WHICH THE CONSTITUTION AND 42 U.S.C. 1983 AUTHORIZE THAT RELIEF MAY BE GRANTED

In the Brault decision, the Court of Appeals stated that the plaintiffs' "invocation of the 14th Amendment's Due Process Clause as the source of their claim for relief comes within Bivens' sweeping approbation of constitutionally based causes of action." (See Brault v. Town of Milton at page 1874.)

In deciding Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court took the position that, although an amendment to the Constitution did not "in so many words provide for its enforcement by an award for money damages for the consequence of its violation...'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done'. Bell v. Hood, 327 U.S., at 684...The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 1 Cranch 137, 163 (1803)." Bivens v. Six Agents, 403 U.S. 388, 396-97 (1971), as quoted in Brault v. Town of Milton at pages 1873-1874.

Paragraph 1 of the complaint herein refers to both the 14th Amendment and 28 U.S.C. §1331 as bases for jurisdiction. Paragraphs 2 and 29 of the complaint herein allege that the amount in controversy exceeds $10,000.00. The 14th Amendment is also referred to in paragraphs 6, 16, 21, 24, 25 and 32 of the complaint.

With regard to the defendant Kornberg: It is respectfully submitted that the First, Second, Third, Fourth and Fifth causes of action herein sufficiently set forth specific causes of action against Mr. Kornberg which are separately maintainable in this Court. The plaintiff has alleged the following set of facts which state actionable claims against the defendant Kornberg pursuant to the 14th Amendment and 42 U.S.C. 1983 over the subject matter of which this Court has jurisdiction and upon which facts this Court may grant the plaintiff relief:

(a) Complaint paragraph "6" - acts of all of the defendants, including the defendant Kornberg, utilizing the power and color of state authority are alleged in this paragraph of the complaint;

(b) Complaint paragraph "9" - specific acts of the defendants, including the defendant Kornberg, are alleged and described;

(c) Complaint paragraph "10" - further specific acts of the defendants, including the defendant Kornberg, are alleged and described;

(d) Complaint paragraph "11" - further specific acts of the defendants, including the defendant Kornberg, are alleged and described;

(e) Complaint paragraph "12" - further allegations of defendants' acts constituting unlawful entry, search and seizure;

(f) Complaint paragraph "14" - allegation that the illegal acts of the defendant police officers described in paragraphs "9", "10" and "11" of the complaint were performed with the knowledge and consent of the defendant Kornberg;

(g) Complaint paragraphs "15" and "16" - allegations that defendants' illegal entries, searches and seizures described in paragraphs "9", "10", "11" and "12" of the complaint were without the issuance of a warrant therefore by an appropriate court;

(h) Complaint paragraph "23" - allegation that defendant Kornberg, acted under color of law, with other defendants to obtain information to be used in criminal proceedings against plaintiff;

(i) Complaint paragraph "25" - allegation that the acts of the defendant Kornberg violated the plaintiff's constitutional rights to be secure in his home against arbitrary and unreasonable searches and seizures among others, and that the defendant Kornberg violated Title 42, United States Code, Section 1983.

Although state officers are usually the only people who can act with the authority of the state for the purposes of Section 1983, it has been held that state action can be established if defendants who are not involved with the state are willful participants in joint activity with the state or its agents. Montanez v. Colegio de Tecnicos de Refrigeracion y Aire Acondicionado de Puerto Rico, 343 F.Supp. 890 (D.C.P.R., 1972). Also see Logan v. Short, 342 F.Supp. (D.C.Mo., 1972) 1349.

It has been held that a private individual who joins with state officials to violate protected rights may be held responsible therefore. Brooks v. Peters, 322 F.Supp. 1273 (D.C.Wis., 1971). Thus, a private individual involved in a conspiracy with state officials may be liable under this section, even though he himself is not a state official. Adickes v. S. H. Kress & Co., 90 S.Ct. 1598, 398 U.S. 144 (1970).

Moreover, an improper motive is not a prerequisite to the maintenance of an action under this section, and a defendant may be found liable even in the absence of an improper motive. Roberts v. Williams, 456 F.2d 819, cert. den. 92 S.Ct. 83, 404 U.S. 866 (1972).

Thus, specific intent to violate plaintiff's constitutional rights is not a necessary element of a cause of action brought under this section. Allison v. Wilson, 434 F.2d 646, cert. den. 92 S.Ct. 43, 404 U.S. 863 (1970). See also Jenkins v. Averett, 424 F.2d 1228 (C.A.N.C., 1970); Banks v. Perk, 341 F.Supp. 1175 (D.C.Ohio, 1972), affirmed in part, reversed in part on other grounds 473 F.2d 910.

The plaintiff has alleged a wrongful breaking and entering in plaintiff's residence by the defendant Kornberg acting jointly with the defendant police officers on March 6, 1972 (Complaint - paragraph "10") in violation of Title 42, United States Code, Section 1983 (Complaint - paragraph "25").

The defendant Kornberg admits entering plaintiff's home on March 6, 1972 in the company of the defendant police officers (Appendix page 37a).

With regard to the defendants Gaudelli and Kahn:

It is respectfully submitted that the complaint satisfactorily alleges a cause of action against the defendants Gaudelli and Kahn based on the 14th Amendment to the United States Constitution and Title 28, United States Code, Sections 1331 and 1343, and Title 42, United States Code, Sections 1981-1988 (Complaint - paragraphs "1" through "30", especially paragraphs "1" and "25") and that "the matter in controversy exclusive of interests and costs exceeds $10,000.00" (Complaint - paragraph "2").

The defendants Gaudelli and Kahn claim that Assistant District Attorneys have immunity for their actions "within their official responsibility." In support of this contention, these defendants relied on three cases which contain within them the very reasons why the motion should have been denied.

In Manfredonia v. Barry, 336 F.Supp. 765, 768, the plaintiffs acknowledged that the complaint referred to no actions of the defendant District Attorney which were not within his official responsibility. Plaintiffs in that case further acknowledged at a hearing of that case that they had no claim against the defendant District Attorney.

In the instant case, plaintiff has referred to actions of the defendant Assistant District Attorneys which are not within their official responsibilities. It is not within the

defendants' official responsibilities as Assistant District Attorneys to:

(a) deprive plaintiff of his Constitutional rights to be protected against cruel and unusual punishment and to be guaranteed due process of law and equal protection under the 14th Amendment (Complaint - paragraph "6");

(b) introduce evidence to a grand jury which the defendant Assistant District Attorneys definitely and specifically knew to be illegally obtained and inadmissible (Complaint - paragraphs "21", "22", "24" and "25");

(c) wilfully, maliciously and wantonly disregard the rights of the plaintiff (Complaint - paragraph "27");

(d) wrongfully withhold plaintiff's property in violation of law (Complaint - paragraphs "26(e)" and "29");

(e) suborn perjury, tamper with a witness in a criminal prosecution, coerce a witness in a criminal prosecution, hinder a criminal prosecution and commit other similar criminal acts in this regard (Complaint - paragraphs "33" and "34"; and

(f) participate in the crimes of extortion and coercion (Complaint - paragraphs "33" through "43").

Defendants have also relied on the case of Bishop v. Goldin, 302 F.Supp. 502. However, in that case the defendant District Attorney supported his motion for summary judgment

with an affidavit that: (a) each decision and act performed by him was done in his official capacity, and in the due and conscientious execution of his duties and (b) that the indictments were each returned in accordance with New York law, and that (c) he conspired with no one to the plaintiff's detriment. Ibid, at page 507.

In the instant case, defendants have submitted no supporting affidavits whatsoever. Thus, the plaintiff may rest upon the mere allegations of his pleading which defendants Assistant District Attorneys have not contested.

The plaintiff has alleged acts including criminal acts which are clearly in direct violation of the terms of their employment as Assistant District Attorneys.

Plaintiff recognizes that at least some of the prosecutor's functions must be immune from suit under the federal Civil Rights Acts. However, there can be no basis in law, public policy or reason for the contention that the criminal acts of a prosecuting attorney are entitled to immunity. Nowhere, in the cases cited by the defendants, is there support for such an argument.

The title of office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral

part of the judicial process. Robichaud v. Ronan, 35 F.2d 533 at 537, 538 (9th Cir. 1965).

Therefore, the Court must presume the truth of the plaintiff's allegations. The test of sufficiency is whether or not it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim to entitle him to relief. Clearly, if the defendants Gaudelli and Kahn have engaged in any of the criminal activities as alleged in the complaint, then they were not acting within their official responsibilities and are not entitled to immunity for their criminal acts.

Moreover, in his concurring opinion in the Fanale case relied on by defendants, Justice Feinberg opined that "even 'official' acts of a prosecuting officer should not be protected by absolute immunity from civil liability", Fanale v. Sheehy, 385 F.2d 866 at 869 (2nd Cir. 1967).

Recently, it was held that if a plaintiff is able to prove prosecutorial misconduct, the prosecutors "...should not be permitted to escape responsibility for their misconduct by hiding behind the shield of immunity." Moritt v. Nadjari, et als., Docket No. 75C554, U.S.D.C., E.D.N.Y., dated August 27, 1975.

With regard to the defendant Klein: Plaintiff has stated a cause of action against Klein based on the 14th Amendment, Title 28 U.S.C. and Title 42 U.S.C. §1983. The acts of extortion and other acts alleged against Klein clearly violate these federal statutes.

## POINT III

### THE MAY 27, 1975 DISTRICT COURT DECISION PERMITTING THE PLAINTIFF TO FILE AN AMENDED COMPLAINT AGAINST THE DEFENDANT KORNBERG IS DEFICIENT IN FAILING TO ADEQUATELY SET FORTH THE BASIS FOR DOING SO, AND PLAINTIFF IS, THEREFORE, UNABLE TO DO SO

The May 27, 1975 decision of the District Court states that factual allegations were made against Kornberg at the hearing on that date which were not before the Court when the original motion was submitted. However, the Court fails to state what allegations against Kornberg it is referring to.

It is respectfully submitted that the Court erred in failing to recognize that the facts to which it is referring are sufficiently alleged in the complaint. The complaint states factual allegations against the defendant Kornberg sufficient to support a cause of action based on the 14th Amendment, 42 U.S.C. 1983 and other causes of action for which the Court could and should have exercised ancillary jurisdiction, as more fully discussed in Point II hereinabove.

In granting plaintiff leave to amend the complaint, the Court is stating that it believes plaintiff has a cause of action "under the federal statute." In failing to specify the new factual allegations which changed the Court's mind in this regard, the Court has made a guessing game out of the drafting of a complaint against Kornberg.

It is respectfully submitted that federal pleading is "notice" pleading. Rule 8(a)(1) of the Federal Rules of Civil Procedure requires only that the complaint contain "a short and plain statement of the grounds upon which the court's jurisdiction depends."

It is respectfully submitted that the complaint sufficiently states the grounds upon which the Court's jurisdiction over plaintiff's complaint against Kornberg depends. The additional factual allegations which the District Court is probably referring to are merely a fleshing out of the following allegations of the complaint:

(a) Acts of the defendant Kornberg were under the power and color of state authority and law (Complaint - paragraphs "6" and "23");

(b) Acts of Kornberg violated plaintiff's constitutional rights including to be secure in his home against arbitrary and unreasonable searches and seizures, and violated Title 42 U.S.C. §1983 (Complaint - paragraph "25");

(c) Acts of breaking and entering and other acts by Kornberg which form the basis of this action are specifically set forth and described as to time, place and nature of act (Complaint - paragraphs "9", "10", "11", "12", "14", "15" and "16".

As discussed in Point II above, specific intent to violate plaintiff's constitutional rights need not be pleaded.

Thus, the District Court has agreed that plaintiff has a cause of action against Kornberg maintainable in the federal courts, but it does not feel that it is sufficiently stated in the complaint. Yet the District Court has failed to identify the area in which the complaint is lacking.

It is respectfully submitted that the District Court, after reading Det. Sassaman's deposition, recognized that the plaintiff had been grievously wronged by those who Det. Sassaman identified as having broken into plaintiff's home, including the defendant Kornberg. This testimony had, through no fault of plaintiff, not been before the District Court when the original motion was heard.

However, it is respectfully submitted that the complaint gives Kornberg sufficient notice of the grounds for this action and no further allegations are required therein.

## POINT IV

### THE COURT COMMITTED REVERSIBLE ERROR IN FAILING AND REFUSING TO EXERCISE ANCILLARY JURISDICTION OVER THE STATED CLAIMS AGAINST THE DEFENDANTS KLEIN, CITY OF NEW YORK, KORNBERG, GAUDELLI AND KAHN

It is respectfully submitted that the complaint satisfactorily alleges a cause of action against the defendants

Saladino, Radtke, Sassaman, Stanley, Dwyer, Fischer and Murray based on the 14th Amendment to the United States Constitution and Title 28, United States Code, Sections 1331 and 1343, and Title 42, United States Code, Sections 1981-1988 (Complaint - paragraphs "1" through "30", especially paragraphs "1" and "25") and that "the matter in controversy exclusive of interests and costs exceeds $10,000.00" (Complaint - paragraph "2").

The defendants have admitted that the entire action is based on an integral set of facts which are sufficient to state a claim against the defendant state officers who acted under color of state law. Kornberg and Klein argue that they did not act under color of state law, and the complaint should be dismissed because it fails to recite facts in support of any thesis that they were acting under color of state law.

District courts may exercise their ancillary jurisdiction to decide all aspects of a case, federal as well as non-federal, where the plaintiff alleges two or more grounds to support one cause of action and where some of the alleged grounds present no independent basis of federal jurisdiction. This has been clear ever since the landmark case of Hurn v. Oursler, (1933) 289 U.S. 238.

Therefore, even assuming that the complaint's causes of action against Kornberg, Klein and the City of New York, Gaudelli and Kahn are not ordinarily heard in the federal

courts, they may still be maintained under the policy of ancillary jurisdiction described above, as claims alleging trespass, conversion, false arrest, malicious prosecution, larceny, invasion of privacy, prima facie tort and extortion.

## CONCLUSION

For all of the foregoing reasons, the Court's decisions dismissing the complaint herein against the defendants City of New York, Gaudelli, Kahn, Kornberg and Klein should be reversed and the defendants' motions to dismiss should be denied.

Dated: New York, New York
September 5, 1975

Respectfully submitted,

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On the Brief:

DAN BRECHER, ESQ.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

VICKI FIELDS being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 230 Park Avenue, New York, New York. That on the 12th day of September, 1975 deponent served the within Brief of Plaintiff-Appellant Robert J. Fine upon the below-listed attorneys for the defendants herein at the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

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Long Island City, New York 11104

Vicki Fields
VICKI FIELDS

Sworn to before me this

12th day of September, 1975.

Dan Brecher

DAN BRECHER
Notary Public, State of New York
No. 31-0398940
Qualified in New York County
Commission Expires March 30, 1977